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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

DAVID M.,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Real Party in Interest.

A147465

(Alameda County
Super. Ct. No. 0J14024045)

Petitioner David M. (Father), the father of 19-month-old David M., Jr. (David, Jr.), challenges the Alameda County juvenile court's February 1, 2016 order terminating family reunification services and setting a permanency hearing under Welfare and Institutions Code section 366.26 (366.26 hearing), for May 26, 2016.¹ He contends there was insufficient evidence to support the court's finding that there was no substantial probability that David, Jr., would be returned to Father's care if services were extended to the 18-month review date. For the reasons given below, we deny the petition.

¹Unless otherwise noted all statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

David, Jr. was born in October 2014. Father, who was not in a relationship with David, Jr.'s mother (Mother) at the time, first learned of the pregnancy when Mother called him as she started labor. Both Mother and David, Jr., tested positive for amphetamines, although Mother denied using them. Mother had an extensive history with child protective services, having had five prior referrals as a parent and five referrals as a minor. Her two oldest children were adopted after her parental rights to them were terminated. Her other three children were being cared for by their maternal grandmother.²

San Francisco Human Services Agency (HSA) filed a detention/jurisdiction report on October 15, 2014, indicating Father needed to be assessed further, given his criminal and substance abuse history. Father had been clean for approximately one month but had used "meth and alcohol." He reported that his criminal history included grand theft auto, and he provided the social worker with the name of his probation officer. At the time of the interview, he was living with his paternal grandmother.

David, Jr., was formally detained at an October 16, 2014 detention hearing. Father requested genetic testing to confirm his paternity but was granted presumed father status and supervised visits based on his voluntary declaration of paternity. After a continuance to allow for a settlement conference, a jurisdiction and disposition hearing was set for November 18, 2014. HSA asked the court to take jurisdiction over David, Jr., and to transfer the matter to Alameda County for disposition because both parents lived there. The social worker reported that Father appeared to be motivated to engage in services and would be better served by having a case worker in Alameda County. On December 4, 2014, Father's DNA report was filed with the court, indicating that the probability that Father was David, Jr.'s biological father was greater than 99%.

²The Alameda County Social Services Agency ultimately recommended that Mother be bypassed for services. Mother has not filed a writ petition challenging the juvenile court's order. We mention Mother in order to explain the context in which this matter came to the court's attention, but we will focus on the facts as they pertain to Father.

The San Francisco juvenile court assumed jurisdiction over David, Jr., based on the following findings: (1) Mother had a substance abuse problem that resulted in both her and David, Jr., testing positive for amphetamines; (2) David, Jr., was at risk of harm due to Father's recent history of alcohol and methamphetamine abuse; and (3) Mother had two older children removed from her care, both of whom were subsequently adopted. On December 22, 2014, the San Francisco juvenile court transferred the case to Alameda County, which received the case on December 29, 2014. The Alameda Superior Court held an initial hearing on the matter on December 31, 2014. After a brief continuance to allow the Alameda County Social Services Agency (Agency) to confirm the parents' residencies, the Alameda Superior Court accepted the transfer and scheduled a disposition hearing for January 29, 2015.

The Agency recommended that Father be provided services, and that Mother's services be bypassed. Father reported that he had used crystal methamphetamine for approximately 10 years and had begun using heroin several years ago. Attempting to get clean, he reduced the use of drugs due to the birth of his son. He wanted to enter a men's residential treatment program and the social worker agreed to refer him for drug testing and outpatient treatment pending his acceptance into a residential program. Father also drank sometimes but did not consider that to be a problem. He reported that he was raised by his mother and stepfather. He entered a group home when he was 15 and was emancipated when he was 18 due to "behavioral problems." He began using drugs when he was 20 years old and explained that the drugs "help him to not feel any pain."

Father visited David, Jr., twice per week and reported that the visits were going well. The visitation supervisor, however, noted various problems. On December 3, 2014, Father was observed overfeeding David, Jr., and was constantly entering and leaving the visitation room. On December 10, 2014, his interactions with David, Jr., were positive, but he became agitated when he was not allowed to be alone with David, Jr., and cursed and stomped his feet. On January 7, 2015, Father arrived more than 15 minutes late for his visit and appeared to be sleeping next to David, Jr., on the floor. On January 14, 2015, he resisted the supervisor's instruction not to close the door

to the visitation room. He cursed and smelled of alcohol. Father's January 26, 2015 visit was canceled because the supervisor was ill, but Father arrived and "smelled heavily of alcohol, was 'acting strange,' did not [make] eye contact," and was observed to have red eyes.

The maternal grandmother informed the social worker that she had a "big problem" with Father. She observed that her daughter had come home with bruises and cuts on her face and a swollen eye. She reported that Father banged on her door, inquiring about Mother's whereabouts. The grandmother believed that Mother minimized their domestic violence problem, rationalizing that Father did not intend to hurt her and did so only when he was drinking.

Overall, the social worker's assessment of Father was that he had substance abuse and anger management issues and a significant criminal arrest history. She stated he "will need to make substantial improvements with treatment should he be deemed appropriate to provide care for the minor." The juvenile court adopted a case plan requiring Father to complete a domestic violence program, a parenting education course, and an inpatient drug treatment, and submit to drug testing. The six-month review was set for July 16, 2015.

The Agency's Six Month Status Review report recommended that the juvenile court maintain David, Jr., in his out-of-home placement, and terminate Father's reunification services. Father was not in compliance with his case plan. He enrolled in drug court in February 2015 but was placed on inactive status shortly thereafter for missing two drug court dates and not responding to a recovery specialist's attempts to contact him. He had not been attending his methadone maintenance program regularly and was terminated from the methadone clinic after failing a breathalyzer test for two weeks. He was referred for outpatient drug treatment and testing, pending his admission to a residential program, but did not respond to the program's calls. He failed to enroll in domestic violence and parenting classes to which he had been referred. On April 17, 2015, Father reported to the social worker that he had been using heroin and methamphetamine and had been drinking every day. Father's sister reported that he

would stop by the family home only periodically, and that several days would go by without the family seeing him. Father was inconsistent in visiting David, Jr. He was arrested on June 13, 2015 for vehicle theft, loitering, and resisting arrest, and was in jail as of the date of the report. At the July 16, 2015 status review hearing, the matter was set for a contested hearing on September 14, 2015.

Prior to the hearing, the Agency filed an Addendum Report on August 24, 2015, in which it reiterated its recommendation that Father's services be terminated. Father remained incarcerated. The social worker met with Father on June 19, 2015 and August 18, 2015, and with a representative at the jail's inmate services on July 23, 2015. The inmate services representative reported that Father had signed up for anger management and substance abuse programs but had not yet started because he was housed in a unit where those classes were unavailable. The representative informed the social worker that Father could request a transfer to the appropriate unit in order to be able to start those classes, and the social worker relayed that message to Father. By August 2015, Father had enrolled in anger management, parenting, and substance abuse programs. He was able to visit with David, Jr., through a glass partition, and planned to enroll in a program that would allow contact visits. Although Father seemed to be beginning to participate meaningfully in programs designed to address his issues, the Agency wrote: "Given his extensive history of heroin and methamphetamine abuse, [Father] will require inpatient substance abuse treatment after being released from Santa Rita Jail. [Father] has completed three to four weeks out of 52 required weeks of domestic violence prevention. Therefore, it is unlikely that additional family reunification services would result in reunification prior to the 12 month hearing."

On September 14, 2015, the juvenile court rejected the Agency's recommendation and ordered that Father's reunification services be continued. It also directed that father/son contact visits take place twice per month while Father was in jail. In its November 16, 2015 status report, the Agency stated: "[Father] continues to be incarcerated at Santa Rita jail and he is not scheduled to be released until November 20, 2015, after twelve months of Family Reunification[] services have passed. He has an

extensive history of substance abuse and also requires domestic violence prevention services.” The Agency opined that it would be detrimental to return David, Jr., to Father’s full-time care because Father still needed to enter an inpatient substance abuse program given his 10-year history of amphetamine abuse, 4-year history of heroin abuse, and alcohol abuse. He also needed to complete a year-long domestic violence prevention program and demonstrate his ability to refrain from domestic violence. The report noted that as of November 16, 2015, Father had only had one visit with his son at the jail. The Agency stated that continuing to provide reunification services to Father would be detrimental to David, Jr., given the minor’s young age and need for permanency. The Agency recommended that Father’s reunification services be terminated “because there is not a substantial probability that the child will be returned to the custody of the parent . . . prior to the expiration of 18 months from the date the child was originally removed” At the November 16, 2015 hearing, the matter was against set for contest, and in the interim, Father was awarded six hours of weekly visitation with David, Jr.

In advance of the contested hearing, the Agency submitted a December 21, 2015 report in which it recommended that Father’s reunification services be terminated and that a 366.26 hearing be set. The report indicated that while incarcerated, Father had participated in a 60-day substance abuse program, a parenting class, and an additional parenting class that permitted contact visits with the child after four consecutive classes. He had attended daily Narcotics Anonymous meetings and had initiated individual counseling. After being released from jail on November 5, 2015, Father contacted the social worker, who referred him for parenting and domestic violence classes and random drug testing. On November 19, 2015, Father tested positive for alcohol; he failed to drug test on November 23, 2015. On November 27, 2015, he entered Cura, a one-year residential treatment program. As of the date of the report, he had only tested once at Cura and the results were still pending. He was scheduled to resume parenting and domestic violence classes once his 30-day blackout period at Cura was over. After being released from jail on November 5, 2015, Father had seen David, Jr., only once due to logistical issues in arranging the visits.

On December 21, 2015, the juvenile court granted David, Jr.'s caregivers' request for de facto parental status over Father's and the Agency's objections. The court then set the matter for a contested hearing on February 1, 2016. On January 6, 2016, the court held an interim hearing regarding visitation and expressed that Father should visit with David, Jr., "as much as possible." Weighing the various concerns about David, Jr.'s schedule, the constraints on Father, who was in the residential substance abuse program, and related staffing issues, the court limited Father's visits to one three-hour visit per week, but gave the Agency discretion to permit two visits per week, with the second visit occurring in Concord.

The Agency called two witnesses at the contested hearing—Kelly Hoehn, the case worker assigned to this case from February 2015 through October 2015, and Anaya Nassor, the case worker assigned after October 2015. Hoehn testified that her recommendation to terminate services was based on Father's 10-year history of substance abuse and the fact that despite his statements, made as early as February 2015, that he would enter residential treatment, he failed to do so before his June 2015 incarceration. He had also been discharged from drug court for missing two drug court dates, and had failed to enter an outpatient drug program. Hoehn acknowledged that Father had engaged in some services in jail beginning August 2015, such as anger management, parenting programs and a class-oriented drug program, DEUCES.

Nassor recommended that reunification services to Father be terminated due to the case history, David, Jr.'s age when he was removed, the length of his placement, Father's limited progress, and the length of time that would be necessary before he could reunify with his son. She testified that children are not allowed to live at Father's current program during the first six months of treatment. Nassor estimated that Father would need to stay in his treatment program for approximately four more months before he could move to transitional housing, which would allow him to live with his son. After that the Agency would need to see how Father did in the community after having been in a controlled environment.

Nassor testified that since entering the residential treatment program, Father had tested positive for drugs only once—on his initial test. He was also visiting David, Jr., and the visits were going well. Nassor was still concerned that Father would begin using drugs again, due to his substance abuse history, and because the initial positive test showed that he was not capable of staying away from drugs during the short period of time between his release from jail and his admission to the program. Nassor also noted that Father had not progressed to unsupervised or overnight visits with David, Jr.

Father testified that he did not participate in any drug treatment program before he was incarcerated, “[p]robably because I was on drugs.” Going to jail “forced [him] to be in sobriety” and to have “a clear mind,” which enabled him to participate in services and “want to do something to continue that.” While in jail, he participated in Teaching and Loving Kids, DADS, anger management, DEUCE (a drug relapse prevention class), and Back to Family. He visited his son regularly and missed only “a couple of visits.” He described his last visit as “wonderful,” stating that he and his son “are getting very much attached to each other.” He testified that during visits, he fed and changed his son, played with him, and was affectionate with him. When asked why he wanted David, Jr., to be with him, he stated: “Because he is my son and we are attached. Our relationship is growing. And I want to be the one that cares for him and teaches him right from wrong. Teaching him how to make his [own] decisions and back his decisions up. I love him, and I know he loves me too. He may not be able to tell me that, but he expresses that at our visits. And I want to take responsibility for the child I bring into this world.”

On cross-examination, Father acknowledged that social worker Nassor visited him in jail on November 4, 2015, to inform him that he had been accepted into Cura, an inpatient drug treatment program. She told him it would be a good program for him. When Father was released from jail the following day, on November 5, 2015, he was aware he could have entered the inpatient program right away. He did not do so because he wanted to spend time with his family and spend Thanksgiving at his mother’s house. He began drinking the day he was released from jail. Approximately 10 days later, he began using heroin. Thereafter, he relapsed “a few times” before entering Cura on

November 27, 2015. He “felt bad about” his relapse but also felt he had “made progress, considering my past usage and my getting out of jail. I would have been hooked from the first day. So I don’t beat myself up about it. I look at it as progress.”

Father further testified that he had been in Cura for two months and that he was in the first phase out of three phases. As part of the first phase, he was attending meetings and making sure he did not “veer off and get back.” He was learning “how to go into society with sobriety” and was expressing himself at meetings. During the second phase, he would be ready to begin looking for work and would be allowed to go out on his own if he “showed progress.” He was not sure what the third phase entailed. He testified that after completing six months of recovery at Cura—which would be on May 27, 2015—he would be allowed to enter a six-month “aftercare program,” during which he would be allowed to have David, Jr., stay with him.

Towards the end of the hearing, the juvenile court focused on the case timeline: “Although we are here for a 12-month report, we are right at the 18-month date, right at two months before the 18-month date, which is shy of the date that [Father] would be done with the residential program at Cura.” After hearing arguments from the parties, the court continued: “So let me start with the fact that [Father] clearly is serious about his recovery. I don’t think anybody here questions whether or not you love your son. I don’t for sure. And I think it’s actually fascinating how once you got into the program—Cura is not an easy program. I know that to be a fact. It’s a good program, but it’s not easy. And you have done everything that you were supposed to do while you were in custody. And since you’ve been in the program you’ve done everything that you were supposed to do. [¶] . . . [¶] . . . Here’s the rub. That [Father] has to take care of hi[m]self to be able to take care of someone else. . . . You’re supposed to take care of your own recovery first, so you’re in a position so you can receive your child back into your home. And often times what we found is when you’re working on your recovery and doing that, that it is difficult to bring your child home, or into the home with you while you’re trying to work on [your]self. A lot of times that doesn’t work out so well. . . .”

The juvenile court continued: “So now the Court is faced with trying to determine whether or not by April the 10th, 2016 there’s a substantial probability of return to you. That would mean that someone here would be encouraging you to leave a program that is clearly working for you, and for you to get into a program that allows you to bring children to the program, and assess whether or not it was appropriate for David, Jr., to come to the program with you within the next two months. [¶] And the truth is, two months in recovery is major. Every day is major in recovery . . . Except that when I’m talking about what’s in the best interest of the child, I don’t know that two months is enough for me to take that jump with you. Meaning that even if you were to find a program right now and you were able to get in this week that allowed for you to have children at the program, you still would have to acclimated to that program to show some consistency in that program for them to give us some feedback about how well you are doing, and whether or not it would be appropriate for David, Jr., to come to that program with you. Because otherwise you’re not getting out of this program and going into transitional housing until May 27th, and the 18-month date is April the 10th.”

The juvenile court determined that Father’s progress has been substantial, but insufficient to alleviate or mitigate the problems necessitating the out-of home placement, and that returning David, Jr., to his care would therefore create a substantial risk of detriment to David, Jr. The court terminated Father’s reunification services, ordered that visitation be as frequent as possible, and scheduled a 366.26 hearing. On February 3, 2016, Father filed a timely Notice of Intent to File Writ Petition. He filed the petition on April 1, 2016, and after we issued an order to show cause, the Agency filed its opposition to the petition.

DISCUSSION

Father contends there was insufficient evidence to support the juvenile court’s finding that there was no substantial probability that David, Jr., would be returned to his care if services were extended to the 18-month review date. We disagree.

“[F]amily preservation is the first priority when dependency proceedings are commenced.” (*In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1112.) To that end,

“[w]hen a child is removed from a parent’s custody, the juvenile court ordinarily must order child welfare services for the minor and the parent for the purpose of facilitating reunification of the family.” (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843; § 361.5, subd. (a).) The grant of child welfare services, including reunification services, is governed by section 361.5. Subdivision (a) of that section provides that where, as here, a child was under the age of three years when initially removed from parental custody, services shall not exceed six months from the date the child entered foster care. A child is deemed to have entered foster care either on the date of the jurisdictional hearing or 60 days after the child was initially removed from parental custody, whichever is earlier. (§ 361.5, subd. (a)(3).)

Notwithstanding the presumptive six-month limitation, services may be extended up to a maximum of 18 months from the date the child was originally removed from parental custody. Thus, if the child has not yet been returned to the parent’s custody at the 12-month period when the statutory time for reunification services has run, the juvenile court may continue the case for up to six months and order an additional period of reunification services. (§ 366.21, subd. (g).) However, the court may exercise this option only if it makes one of two findings: (1) that there is a substantial probability that the minor would be returned to the parent’s physical custody and safely maintained there within 18 months of the initial removal; or (2) that reasonable services were not offered to the parent. In making this determination, the court must consider, among other factors, whether “[t]he parent . . . has demonstrated the capacity and ability both to complete the objectives of his . . . treatment plan and to provide for the child’s safety, protection, physical and emotional well-being, and special needs.” (§ 366.21, subd. (g)(1)(C).)

We review a juvenile court’s order terminating reunification services under the substantial evidence standard. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020; *In re Shaundra L.* (1995) 33 Cal.App.4th 303, 316–318.) Any conflict is resolved in favor of the court’s order, and we make all legitimate inferences necessary to uphold its determination. (*In re Kirstin H.* (1996) 46 Cal.App.4th 1635, 1649.)

Here, Father had an extensive substance abuse history that included 10 years of crystal methamphetamine use and several years of heroin use. He stated at the beginning of the proceedings—in October 2014—that he wished to enter a residential treatment program in order to “get clean” for his newborn son, but failed to follow through for ten months—until August 2015—before he finally began meaningfully participating in programs while in jail. Further, despite the fact that he was aware he could enter Cura immediately upon his release from jail, he failed to enter the program, and instead, began drinking the day he was released, and began using heroin again approximately 10 days later. He relapsed “a few times” before entering Cura on November 27, 2015—over 13 months after the dependency proceedings commenced.

By the time the 12-month hearing took place on February 1, 2016, Father was fully participating in programs at Cura and had accomplished two months of sobriety. He appeared to be taking his recovery seriously, was visiting David, Jr., regularly, and expressed his love and affection for him. While we commend Father for taking these important steps to resolve his issues, we note, as the juvenile court did, that because of Father’s delay in engaging in services, he was left with only two months to demonstrate there was a substantial likelihood that David, Jr., could be placed with him by the 18-month mark. At the time of the hearing, Father was still on phase one out of three phases for recovery at Cura. He had not yet shown he was—or would soon be—capable of living substance-free in an unstructured environment for any period of time. His recent visits with David, Jr., had gone well, but he had not progressed to unsupervised or overnight visits. Although two months of sobriety was significant, he had almost four months to go—until May 27, 2016—before he could enter an “aftercare program” that would allow him to have David, Jr., stay with him. Father asserts the court should have extended the reunification period because there was “more than a reasonable basis to conclude that [his] relationship with [David, Jr.] could be saved with the provision of additional services.” *Childhood*, however, “does not wait for the parent to become adequate.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) “While [a few months] may not seem a long period of time to an adult, it can be a lifetime to a young child.” (*Ibid.*)

In light of David, Jr.'s, young age and his need for permanency, and Father's extensive history of substance abuse and relatively short period of sobriety and recovery, the court could reasonably find there was no substantial likelihood David, Jr., would be returned to Father's care within the 18-month period.

Father asserts the juvenile court failed to consider his "special needs" stemming from his incarceration. (See § 361.5, subd. (a)(3) [court should consider special circumstances of incarcerated parents in determining whether to extend services].) The court, however, specifically referenced its obligation to consider Father's incarceration, and indicated it had done so by giving Father the "benefit of the doubt before we got to 18 months" by extending services during his incarceration. Father also asserts the court set too high a standard by implicitly requiring him to show there was a certainty that he and David, Jr., would be reunited—not merely the requisite "substantial probability" of return. The record, however, does not support Father's characterization of how the court understood the standard. Rather, the court explicitly stated it was considering whether there was "a substantial probability" that David, Jr., would be returned to Father by April 10, 2016, before finding that in light of the short, albeit significant, period of recovery, and the various things Father would have to accomplish before he could have David, Jr., placed in his care, the court was not prepared to "take that jump."

DISPOSITION

Father's petition for an extraordinary writ is denied. Our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.

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